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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE CITIES OF RENO AND SPARKS, WASHOE COUNTY, AND THE WASHOE COUNTY METROPOLITAN WATER AUTHORITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED AND STATEMENT OF THE CASE

We hereby adopt the QUESTIONS PRESENTED contained in the Petition, Pet. (i), and Petitioners' STATEMENT OF THE CASE. Pet. 3-8.

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INTEREST OF *AMICI* *

The Cities of Reno and Sparks comprise the bulk of the population in Washoe County, Nevada, and depend on the Truckee River and its tributaries as their primary source of municipal and industrial water. The Washoe County Metropolitan Water Authority (the "Authority")

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* *Amici curiae* are political subdivisions of the State of Nevada and accordingly file this brief pursuant to Sup. Ct. R. 36.4.

was created in 1983 by the Nevada Legislature to plan for the present and future use of water resources within Washoe County.[1] These entities represent the citizens of the Truckee Meadows area and are vitally interested in the allocation of the scarce resources now controlled by the Secretary of the Interior (the "Secretary") through the Stampede Dam and Reservoir, which was constructed pursuant to the Washoe Project Act, 43 U.S.C. §§ 614-614d (West 1964). Although the central purpose of the Act was to develop and conserve the resources of the region so that the available water could be used more productively, the Secretary has consistently refused to sell water to Petitioners for municipal and industrial ("M&I") use. It appears evident that the Secretary would likewise refuse to sell water to these *amici* or other entities authorized to contract for such water. The Secretary's position violates the federal reclamation laws of which the Washoe Project Act is a part and jeopardizes the existence and preservation of a reliable water supply for Washoe County and its citizens. Reno, Sparks, Washoe County, and the Authority join together as *amici curiae* because the Ninth Circuit's ruling requires the Secretary to ignore totally the congressionally mandated purposes underlying the Washoe Project Act and related federal reclamation laws.[2]

To ensure that the Project's costs would be recouped, Congress specifically directed that a water conservancy district be created and that the Secretary enter into repayment contracts prior to delivering water from Stampede. 43 U.S.C. § 614a(c). Although a repayment

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[1] 1983 Nev. Stat. Ch. 487.

[2] *Amici* concede that the Secretary's responsibility under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, to avoid jeopardizing the existence of endangered or threatened species takes priority over his duties under the reclamation laws. Although we agree with Petitioners that the courts below erred in their construction of the Endangered Species Act, *amici* are focusing only on the Ninth Circuit's interpretation of the Washoe Project Act.

contract was prepared in 1965, the Secretary has refused to honor his obligation to seek reimbursement for the Project's costs, deciding instead to use the water for non-reimbursable uses only. The Ninth Circuit agreed "that M&I use is a 'beneficial purpose' for which the Secretary is authorized to sell the project's water," Pet. App. 4a, but held that the Secretary is not *required* to do so. This holding fundamentally misconstrues the Secretary's obligations under the Washoe Project Act and related federal reclamation laws. Because access to the resources made available through federal reclamation projects such as the Washoe Project is crucial to the continued growth and prosperity of the communities like those *amici* represent, we ask this Court to grant the petition and reverse the decision below.

REASONS FOR GRANTING THE PETITION

1. The Court Below Misinterpreted the Washoe Project Act.

The Ninth Circuit, at two points in its decision, purported merely to vacate the District Court's ruling that the Secretary was obligated to sell M&I water to petitioners. *See* Pet. App. 4a-5a. At a third point in its opinion, however, the court clearly held "that the Washoe Project Act does not require the Secretary to sell water for M&I use." Pet. App. 8a n.5. The Court of Appeals based its ruling on two factors: (1) that circumstances have changed rendering irrigation an inefficient use of the Project's water; and (2) that the language of the Washoe Project Act did not require reimbursement before construction of the Project. As *amici* will demonstrate, neither consideration relieves the Secretary of his obligation to obtain reimbursement by selling the Project's water for M&I use to entities authorized to contract for such water.

Prior to the adoption of the Washoe Project Act, the Secretary undertook a comprehensive analysis of the pro-

posed Project[3]—including studies of the existing water supply, construction plans, agricultural economy and needs, repayment capability of the farmers who were expected to use the bulk of the Project water for irrigation, cost-benefit factors, and the allocation of costs among multiple uses of the Project. *See* H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955). The Secretary repeatedly represented to Congress that 86% of the Project's costs would be recouped by allocating most of the water to reimbursable functions. H.R. Rep. No. 2055, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 3755, 3760. The Senate sponsor—Senator Bible of Nevada—also made it clear to his colleagues that most of the costs associated with the Washoe Project were to be repaid to the Reclamation Fund. 102 Cong. Rec. S6299-6300 (daily ed. April 26, 1956) (remarks of Sen. Bible). Thus, both Congress *and the Secretary* clearly intended that the Federal Government be reimbursed by selling the Project's water to farmers and other users.

As the lower courts noted, circumstances changed after the Washoe Project Act was adopted in 1956. Although the Bureau of Reclamation (the "Bureau") recognized that two communities in eastern California might need M&I water from the Project at some point and requested flexibility to adjust the Project's plan accordingly, it did not foresee the rapid population growth in the Reno-Sparks area that began in the late 1950's. When it became clear that the need for M&I water exceeded the need for irrigation, the Carson-Truckee Water Conservancy

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[3] This study was undertaken pursuant to the Reclamation Project Act of 1939, 43 U.S.C. § 485h, which requires the Secretary to report to Congress on the engineering feasibility of the proposed construction, the estimated cost of the project, the amount of water allocated to irrigation that will probably be repaid by the users, and *"the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States."* 43 U.S.C. § 485h(a) (1982) (emphasis added).

District (the "District") asked the Bureau to study the need for additional M&I water and to provide for that need in the Project's Definite Plan Report.

The Report was issued in 1966 and noted:

> Earlier plans called for the project water developed on the Truckee River system to be used, by exchange, for irrigation of new land in Carson Valley. As urban and industrial development accelerated in the Reno Valley, the urgency of providing water to support this growth became evident and of great concern locally. At the same time, local interest in the planned new land irrigation in Carson Valley became more uncertain and feasibility of this part of the project became doubtful. *It was evident that project water from the Truckee River would be more beneficial when used as a municipal and industrial supply. The plan was therefore changed to include this purpose and exclude new land irrigation.* [Bureau of Reclamation, U.S. Dep't of the Interior, *Definite Plan Report—Washoe Project, Nevada-California* 3 (1966); emphasis added.[4]]

Under the revised plan, M&I sales were intended to represent the bulk of the reimbursement for the Project's costs. During the years prior to the construction of Stampede Dam in 1970, the Secretary repeatedly informed Congress of the change in circumstances and represented that distribution of the water for M&I purposes would generate substantial reimbursement payments from the District.[5]

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[4] *See also* id. at 11, 33-34.

[5] *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 88th Cong., 2d Sess. pt. 2 at 162 (1964); *Hearings on H.R. 9220 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 89th Cong., 1st Sess. pt. 3 at 251, 253 (1965); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 1st Sess. pt. 2 at 201, 203 (1965); *Hearings on H.R. 17787 Before the Subcomm. on Public Works*

The entire history of the Washoe Project—including the legislative history of the Act itself and the subsequent modification of the Project's plan—reflects an understanding by all involved that the Project was to be operated almost entirely for reimbursable purposes and that Congress intended the the Secretary to enter into repayment contracts with the District. The Ninth Circuit's reasoning that because irrigation is no longer a feasible use for the Project's water the Secretary need not obtain reimbursement by selling the water for M&I use turns congressional intent on its head. Had Congress wished to alter the obligation to obtain reimbursement when it learned that irrigation was no longer the most beneficial use of the water, it could have easily amended the Act. By leaving the reimbursement obligation intact, Congress approved the M&I use. *See United States* v. *Beebe*, 180 U.S. 343, 354 (1901); *Arizona Power Pooling Ass'n* v. *Morton*, 527 F.2d 721, 726 (9th Cir. 1975) ("Knowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification"). The mere fact that irrigation is no longer the most beneficial use of the Project's water is a slim

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Appropriations of the Senate Comm. on Appropriations, 89th Cong., 2d Sess. pt. 3 at 186 (1966); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess. pt. 2 at 207 (1966); *Hearings on H.R. 11641 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 90th Cong., 1st Sess. 405 (1967); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 90th Cong., 1st Sess. pt. 2 at 535 (1967); *Hearings on H.R. 17903 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 90th Cong., 2d Sess. 417 (1968); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 90th Cong., 2d Sess. pt. 2 at 1006 (1968); *Hearings on H.R. 14159 Before the Subcomm. on Public Works Appropriations of the Senate Comm. on Appropriations*, 91st Cong., 1st Sess. 2681 (1969); *Hearings on Public Works Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess. pt. 3 at 267 (1969).

reed on which to base a ruling that the Secretary no longer needs to seek reimbursement for the Project's construction, operation, and maintenance costs—especially where Congress specifically approved of the change in utilization.

2. The Ninth Circuit's Ruling Ignored the Interrelationship Between the Washoe Project Act and Other Federal Reclamation Laws.

The second underpinning of the Ninth Circuit's decision that the Washoe Project Act does not require the Secretary to sell M&I water is that the Act "did not prohibit the Secretary from constructing the project until repayment contracts for the project had been entered into," unlike some other project authorizations. Pet. App. 5a. Although it cited 43 U.S.C. § 614a(a), which subjects the Secretary's conduct to federal reclamation laws generally, the court failed to analyze the interplay between the Washoe Project Act and the other reclamation laws by which the Act is governed.[6] Because the Act incorporates reclamation law generally, this Court should consider not only the specific provisions of the Washoe Act but also the entire reclamation structure erected by Congress. *See generally Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (courts must consider the entire statutory scheme); *Kokosszka* v. *Belford*, 417 U.S. 642, 645 (1974) (courts should look to purposes underlying the statute for guidance).

On several occasions this Court has considered the history and construction of the federal reclamation laws, *see, e.g., California* v. *United States*, 438 U.S. 645, 653-670 (1978), and the obligation to seek reimbursement for the costs of construction, operation, and maintenance,

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[6] We adopt Petitioners' argument set forth at Pet. 20-24 and offer the following to stress the importance of the relationship between a specific project authorization and the general framework of federal reclamation laws.

which can be found in the Reclamation Act of 1902, 43 U.S.C. § 498. In one of the first cases construing the Reclamation Act, this Court noted that the Reclamation Fund was to be refurbished with the proceeds of each project so that its coffers would never be empty but would always be available for new projects as needed. *Swigart* v. *Baker*, 229 U.S. 187, 197 (1913).

This reimbursement obligation was made even more explicit in the Reclamation Project Act of 1939, 43 U.S.C. §§ 485 *et seq.*, which requires the Secretary to undertake a thorough study of a proposed project's feasibility before obtaining authorization from Congress to proceed with construction. *See* 43 U.S.C. § 485h(a) (1982). The report to Congress must state how much of the cost can be allocated to reimbursable uses such as irrigation, power, and municipal supply that will *"probably be repaid by the water users."* *Id.* (emphasis added). Section 485h expressly provides that if "the repayable and returnable allocations to irrigation, power, and municipal supply or other miscellaneous purposes" equal or surpass the total estimated costs of construction, then the project "shall be deemed authorized and may be undertaken by the Secretary." If, however, the expected recoupment does not equal the expected costs, the Secretary must obtain congressional approval before constructing the project. *Id.*

Section 485h would be wholly thwarted if the Secretary could obtain project authorization through his representation that almost the entire cost would be reimbursed and then use the project solely for non-reimbursable purposes. Yet, that is precisely the effect of the Ninth Circuit's ruling in this case. The Secretary represented to Congress in his Section 485h report that 86% of the Washoe Project's costs would be repaid by the direct beneficiaries of the Project. On that basis, Congress approved the expenditure of federal funds. As it became clear that M&I use was more important to the region

than was irrigation, Congress was reassured that reimbursement would be obtained even though the most beneficial use of the water had changed. The lower court's misreading of the statutory interplay between the Washoe Project Act and the other reclamation laws to which the Act is subject grants the Secretary unreviewable discretion to ignore the congressional directive to use the water for reimbursable purposes.

The Ninth Circuit's decision also fails to consider the effect of the Water Supply Act of 1958, 43 U.S.C. § 390b. Section 390b(a) of that Act directs federal agencies to "participate and cooperate with States and local interests" in developing water supplies for domestic, municipal, industrial and other uses through the "construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." Thus, the Secretary is charged with the affirmative duty to work with local interests in preserving an adequate M&I water supply. This duty takes on special significance in this case because M&I use is the only feasible use through which the Reclamation Fund will be repaid the costs associated with the Washoe Project.

When the Washoe Project Act is read in conjunction with these related reclamation statutes, the Secretary's duty to obtain reimbursement for the Project's costs becomes clear. Accordingly, because M&I use is the most beneficial reimbursable use of the water flowing through Stampede Dam, the Secretary is obligated to enter into repayment contracts for M&I water. Only in this way can the congressional intent underlying the Washoe Project Act be effectuated.

CONCLUSION

The court below judicially repealed the repayment obligation that has been the bedrock of the country's reclamation laws for nearly a century. For this reason and for those given in the petition, *amici* urge this Court to grant the petition and to reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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